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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

Nos. 371 and 382.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

v.

E. H. MILSTEAD,
Respondent,

and

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN et al.,
Petitioners,

v.

E. H. MILSTEAD,
Respondent.

REPLY BRIEF

Of Respondent in Opposition to Petitions for Writ of Certiorari to the Supreme Court of Alabama.

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Tunstall v. Brotherhood of Locomotive Firemen & Enginemen (December 18, 1944), 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187 13

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Title 28, § 1257, U. S. C. A. 4, 5, 8, 11, 14
Title 28, § 1291, U. S. C. A. 10, 11
Title 28, § 1292, U. S. C. A. 10

Textbook Cited.

6 Moore, Federal Practice (2d Ed. 1953) 113 11

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REPLY BRIEF

Of Respondent in Opposition to Petitions for Writ of Certiorari to the Supreme Court of Alabama.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

E. H. Milstead, the Respondent, by his attorney, respectfully opposes the petitions filed by Petitioners for a writ of certiorari to review the judgment of the Supreme Court of Alabama entered on May 10, 1962. Although the petitions were docketed separately in this Court, Respondent is treating them as consolidated because they are identical and involve the same cause in the Supreme Court of Alabama.

STATEMENT OF THE CASE.

Because Petitioners' statement of the case leaves out or de-emphasizes certain important procedural facts, and because it injects immaterial procedural facts, Petitioners' statement perhaps requires clarification and comment.

Petitioners suggest that Respondent's complaint now pending in the Circuit Court of Jefferson County is simply a request for an interpretation of the provisions of the collective bargaining agreement bearing on his seniority position as a locomotive engineer. This overlooks the significant factor which avoids the exclusive jurisdiction of the National Railroad Adjustment Board (hereinafter referred to as the N. R. A. B.). In truth, Respondent's complaint specifically charges that the Atlantic Coast Line Railroad Company (hereinafter referred to as the A. C. L.), the Grand International Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen purposefully and knowingly misapplied or ignored the pertinent provisions of the contract in order to deny Respondent his correct seniority. Fully recognizing the burden of proof which he is undertaking, Respondent charges that his employer and his own collective bargaining representatives have cooperated to discriminate against him without any reasonable basis for the discrimination, in other words, that they are guilty of hostile discrimination (for reasons of union politics), as opposed to realistic discrimination.

In stating the case, Petitioners spend considerable time discussing collateral proceedings, i. e., the A. C. L.'s purported submission to the N. R. A. B., and the injunction issued by the Circuit Court of Jefferson County enjoining the A. C. L. from proceeding with the said purported submission. It is interesting to note that the A. C. L. did not

decide to avail itself of what it now finds to be its inalienable right to have the dispute submitted to the N. R. A. B until the Supreme Court of Alabama had clearly held to the contrary. This purported ex parte submission of the controversy to the N. R. A. B. three years after Respondent had brought it to the Circuit Court of Jefferson County, directly in the face of the decision of the Supreme Court of Alabama, is an obvious maneuver designed to color the case for the purpose of this petition for a writ of certiorari, so as to "qualify" it in some back-door way. The only review here being sought is in one case from one decision of the Supreme Court of Alabama. The subsequent purported submission to the N. R. A. B. is entirely collateral and therefore immaterial. On its face it can have no bearing either on the question of reviewability or on the merits of the appeal. As far as the injunction suit is concerned, it is not even a part of the record. For that reason, there is certainly no need here to discuss it. If Petitioners sincerely feel that the injunction was erroneously granted, the proper procedures for its review are available.

The procedural posture of the only case upon which the instant petition is based, is not set out by Petitioners with full clarity. The reason for this omission can be quickly understood. The Circuit Court of Jefferson County (the trial court) initially decided that it did not have jurisdiction of Respondent's complaint. This decision was based upon the trial court's opinion that N. R. A. B. jurisdiction was exclusive over the subject matter. The Supreme Court of Alabama held that the Circuit Court did have jurisdiction. It therefore reversed and **"remanded"** the cause **"for further proceedings therein"** (R. 56, 66).

REASONS FOR DENYING THE PETITION.

This Court should refuse to grant both of the petitions for a writ of certiorari for either one of two reasons, viz.:

1. The decision of the Supreme Court of Alabama was not a final judgment or decree within the intendment of Title 28, § 1257, U. S. C. A., so as to confer jurisdiction on this Court.

2. The decision of the Supreme Court of Alabama was clearly correct and in conformity with the decisions of this Court.

ARGUMENT.

If the case were ripe for review, Respondent would have no fear of a full and fair consideration of the merits of the matter attempted to be presented, i. e., whether or not under the allegations of his complaint Respondent's exclusive remedy is with the N. R. A. B. In fact, Respondent would enjoy exploring with this Court the cases and authorities which convinced the Supreme Court of Alabama to overrule its own prior decision, **Davis v. Southern Railway** (October 4, 1951), 256 Ala. 202, 54 So. 2d 308. Respondent finds it hard to resist the temptation to expound upon (a) the purpose of the N. R. A. B. and its limitations of functions as conceived by Congress; (b) whether or not the Railway Labor Act provides an employee the equal protection of the laws; or (c) footnote 4 in **Conley v. Gibson**, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 80. But, these questions are, and must remain, academic until the jurisdiction of this Court is properly invoked so as to make these questions ripe for discussion.

The Non-Finality of the Judgment of the Supreme Court of Alabama.

Title 28, § 1257, U. S. C. A., limits the jurisdiction of this Court, insofar as the review of state court decisions is concerned, to "final judgments or decrees rendered by the highest court of a State." The tests for determining finality which have been laid down by this Court are exhaustively treated in Annotations to be found at 89 L. Ed. 1187, and 97 L. Ed. 208. There would be no purpose in here reviewing the whole line of decisions on the subject which are well presented in these Annotations. However, several of the cases do have peculiar applicability so as to warrant specific reference.

A good and concise statement of the pertinent proposition of law is found in **Georgia Railway & Power Co. v.**

Decatur (June 4, 1923), 262 U. S. 432, 43 S. Ct. 613, 67 L. Ed. 1065. At page 1073 of 67 L. Ed. this Court stated the rule as follows:

> . . . the rule is established that, in order to give this Court appellate jurisdiction, the judgment or decree "must terminate the litigation between the parties *on the merits of the case*, so that, if there should be an affirmance here, the court below would have nothing to do but execute the judgment or decree it had already rendered." Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73, 1 Sup. Ct. Rep. 15 and cases cited. (Italics supplied.)

In the instant case, the merits have never been considered. If the trial court had initially determined that it had jurisdiction of the subject matter, the litigation would have proceeded in logical sequence with a hearing on the merits before any appeal to the Supreme Court of Alabama. Under present circumstances, the only difference is that a consideration of the merits has been postponed because the trial court erroneously concluded that it did not have jurisdiction. Certainly Petitioners would not now be complaining in this Court before a consideration of the merits by the trial court if the trial court had ruled as did the Supreme Court of Alabama. The controversy will not end simply by the performance of a ministerial act by the trial court pursuant to an instruction of the Supreme Court of Alabama. The Supreme Court of Alabama remanded the case for further appropriate proceedings. Petitioners can still demur. If their demurrer is overruled, they can plead so as to deny or to confess-and-avoid the allegations. After that, they can try the case.

There could be nothing more tentative, or, to put it another way, nothing less final, than a simple determination that a Court has jurisdiction. This is well illustrated by two cases directly in point. The first case is **Southern**

Pacific Co. v. Gileo (June 11, 1956), 351 U. S. 493, 76 S. Ct. 952, 100 L. Ed. 1357. Southern Pacific petitioned this Court for a writ of certiorari on the following facts. A California trial court had ruled that it lacked jurisdiction of the subject matter presented by certain plaintiffs against Southern Pacific. The ruling was based on Southern Pacific's contention that the exclusive jurisdiction under the circumstances was with the Industrial Accident Commission under the California Workmen's Compensation Act. Before the appeal to the Supreme Court of California, the parties had not stipulated with respect to the issues of negligence and damages, i. e., the merits. At page 1363 of 100 L. Ed this Court held as follows:

> There were no trials of these issues, and, under California practice, the effect of the Supreme Court of California's unqualified reversal is to remand the cases to the trial court. See Gospel Army v. Los Angeles, 331 U. S. 543, 546, 91 L. Ed 1662, 1665, 67 S. Ct. 1428. *Since the issues of negligence and damages remain to be tried*, there is no final judgment in the highest court of the State, and this court, therefore, lacks jurisdiction to review . . . (Italics supplied.)

This case exactly parallels that of Respondent against Petitioners in the Circuit Court of Jefferson County. As in the instant case, the trial court found that exclusive jurisdiction was with another tribunal and therefore declined to hear the case. The highest court of the state ruled to the contrary, and remanded for consideration on the merits. There could be no better support for Respondent's contention that the instant decision by the Supreme Court of Alabama was not a final judgment.

The second case closely in point is **Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.** (December 8, 1952), 344 U. S. 178, 73 S. Ct. 196, 97

L. Ed 204. There an Alabama trial court granted a temporary injunction restraining a labor organization from peaceful picketing upon a finding that the picketing constituted a secondary boycott. The defendant union moved to dissolve the injunction on the ground that the National Labor Relations Board had exclusive jurisdiction over claims of secondary boycott. The Supreme Court of Alabama affirmed the trial court's denial of the motion to dissolve. After having first granted the writ of certiorari, this Court held that the writ had been improvidently granted because the decision of the Supreme Court of Alabama was not a final judgment. As in the case now before the Court, the decision by the highest reviewing court of the state was simply on a question of jurisdiction as between a state court and a federal administrative agency. This Court rightly concluded that the state court decision on this point provided no final determination under Title 28, § 1257, upon which review could be sought. In the parlance of the prize ring, "Round No. 1 is a far distance from the final bell."

Another case which aptly demonstrates that the decision of May 10, 1962, was not a final judgment is **Pope v. Atlantic Coast Line R. R. Co.** (April 27, 1953), 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed 1094. In that case, the A. C. L. had petitioned a Georgia court with *nisi prius* jurisdiction to enjoin its employee from prosecuting his F. E. L. A. claim in an Alabama court. The employee demurred on the ground that the F. E. L. A., a federal act, guaranteed him the right to sue at any place at which the A. C. L. did business. On appeal to the Supreme Court of Georgia, that court held that the employee's demurrer was not good. Thereupon, the employee petitioned this Court for a writ of certiorari. At page 1098 of 97 L. Ed. this Court considered the question of reviewability, as follows:

> The finality problem arises in the case because the judgment of the Georgia Supreme Court did not, on its

face, end the litigation. * * * *But petitioner has no other defense to interpose. He has been both explicit and free with his concession that his case rests on his federal claim and nothing more.* If the court below decided that claim correctly, then nothing remains to be done but the mechanical entry of judgment by the trial court. Thus, as the case comes to us, the federal question is the controlling question; "there is nothing more to be decided." (Italics supplied.)

Are Petitioners here freely conceding that Respondent's complaint is meritorious and would be decided in his favor if he successfully leaps the jurisdictional hurdle? If these petitions by Respondent's employer and his bargaining representatives had contained an admission of ultimate guilt, or if, as suggested in **Southern Pacific Co. v. Gileo**, *supra*, they had stipulated the damages, then they might claim the finality provided by the **Pope** cases. Under such circumstances Respondent would certainly have no quarrel over the question of finality.

Petitioners defer their consideration of the question of reviewability until the very end of their briefs, and then treat it only cursorily. Apparently realizing that their appeal is in the face of the overwhelming authority on the question of finality, they nevertheless rely upon **Cohen v. Beneficial Industrial Loan Corp.** (June 30, 1949), 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528; **Swift & Co. v. Compania Colombiana** (June 5, 1950), 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206, 19 A. L. R. 2d 630; and **Dibella v. United States** (March 19, 1962), 7 L. Ed. 2d 614. A careful examination of these cases fails to provide petitioners an honest foot-in-the-door.

In the **Cohen** case, *supra*, a stockholder had sued a corporation in a stockholder's derivative action in a federal district court in New Jersey. The New Jersey law required security by a minority stockholder under such cir-

cumstances to indemnify the corporation for its defense costs. The district court held that the said New Jersey law was not applicable in a federal court proceeding. The Court of Appeals accepted an appeal and reversed on this question. The question in this Court was the appealability of the original order overruling the corporation's motion to require security. This necessitated a construction of Title 28, § 1291, U. S. C. A., which grants to Courts of appeal jurisdiction of appeals from "all final *decisions* of the district courts of the United States" (Italics supplied). At page 1536 of 93 L. Ed. this Court made mention of the fact that Title 28, § 1292, allows appeals from interlocutory orders in the federal judicial system so as to indicate "the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties." On the same page, this Court continued as follows:

> It is obvious that if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable.

Further the Court said:

> Nor does the statute permit appeals, even from fully consummated *decisions*, where they are but steps towards *final judgment* in which they will merge (italics supplied).

The **Cohen** case was not dealing with Title 28, § 1257, involved in the instant case. There is a great deal of obvious difference between a review by a Court of Appeals of a **federal** district court final **decision** and a review by the Supreme Court of the United States of a **state** supreme court final **decree** or **judgment**. If the distinction were not already apparent, the **Cohen** case would make it so. In addition, in the language of **Cohen**, decision on the question of jurisdiction is "but a step toward final judgment in which it will merge".

Swift & Co., *supra*, was an admiralty case brought in a federal district court with the attachment of a vessel as an ancillary procedure. The district court vacated the attachment. By construing Title 28, § 1291 as not precluding the review of the claim because fairly severable from the context of a larger litigious process, this Court agreed to review. But in stating its rationale at page 1210 of 94 L. Ed., the Court said as follows:

> Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible.

Again, Title 28, § 1257, was not being construed, either expressly or impliedly. Further, in the instant case, it could hardly be said that a review of the jurisdictional question after a trial on the merits would be an "empty rite" as in **Swift & Co.**

The **Dibella** case, *supra*, is cited by Petitioner A. C. L. at page 9 of its brief for the proposition that a decision by a state court in favor of its plenary jurisdiction is final as respects review by this Court. This proposition is belied by an examination of the case. Petitioner does not quote from **Dibella**, and for good reason. Not only does the case not involve Title 28, § 1257, but after the opinion outlines the exceptions to the strict rule of finality (such as mentioned in the **Cohen** and **Swift & Co.** cases), at page 618 of 7 L. Ed 2d, the Court says as follows:

> Despite these statutory exceptions to, and judicial constructions of, the requirement of finality, "the final judgment rule is the dominant rule in federal appellate practice." 6 Moore, Federal Practice (2d ed, 1953) 113.

The Court went on to find that the denial by a **federal** district court in a **criminal** case of a motion to suppress

certain evidence was not fairly **severable** from the context of a larger litigious process. The instant question arose 1. in a **state** court, 2. in a **civil** case, and 3. is **preliminary** and **basic**, rather than **severable** and **collateral**.

As good a way as Respondent can find to summarize the rule of finality for review of state court judgment, is to quote from **Radio Station WOW v. Johnson** (June 18, 1945), 326 U. S. 120, 65 S. Ct. 1475, 89 L. Ed 2092, at page 2097 of 89 L. Ed as follows:

> Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until litigation has been concluded in the court of first instance. (Citing cases.) This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. * * * *This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court.* Here we are in the realm of potential conflict between the courts of two different governments. And so, even since 1789, Congress has granted this Court the power to intervene in State litigation only after "the highest court of a State in which a decision in the suit could be had" has rendered a "final judgment or decree." Section 237 of the Judicial Code, 28 U. S. C. A., § 344 (a), 8 F. C. A. title 28, § 344 (a). This requirement is not one of those technicalities to be scorned. It is an important factor in the smooth working of our Federal system. (Italics supplied.)

The italicized sentence in the above quotation clearly again distinguishes the cases relied upon by Petitioners, none of which involves the review of a state court decision.

Petitioners' Reference to the Fact That Three Out of Four of the Locomotive Engineers Who Would Be Affected by the Seniority Change Being Sought Are Not Before the Trial Court.

Although Respondent may be somewhat guilty of joining issue on the merits at this point, he prefers not to allow Petitioners' sweeping assertions about the effect of the absence of three out of the four locomotive engineers who would be "affected" by its claim to go completely unchallenged. Because all "affected" parties are not in court Petitioners jump to the conclusion that the basic philosophy of the Railway Labor Act would be emasculated if the cause proceeded to final judgment. This argument has already been heard and rejected by the Supreme Court of Alabama, which is the final word on the question of who are "necessary parties" in Alabama courts. In the first place, the Brotherhoods, which represent all employees, are formal parties to the suit. The particular employees who happen to be carried on the seniority roster ahead of Respondent are not necessary parties in the suit seeking declaratory relief. They were originally named gratuitously. Even if there should be a requirement that they be represented before the trial court, they are, in fact, represented as a class both by their own unions and by the party, C. C. Griggers, who is a fellow employee situated exactly as they are. Petitioners are here making technical small-talk. The clinching point in Petitioners' attempt to raise a Frankenstein is the point which impiedly appears in **Steele v. Louisville & Nashville Railway Co.** (December 18, 1944), 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, and **Tunstall v. Brotherhood of Locomotive Firemen & Enginemen** (December 18, 1944), 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed 187, where it was first held that an employee discriminated against is not required to go before the N. R. A. B. In those cases, this Court did not hesitate just because several thousand employees were

not formal parties to the suit, even though they most assuredly were affected by the decision which required that some employees not be discriminatorily treated. The obvious explanation is that the union, both technically and actually, represented all affected employees. Whenever a person is a victim of discrimination, there is someone who is taking advantage of it, and, therefore, someone who has a stake in its continuation. To eliminate the discrimination eliminates his advantage, and therefore indirectly affects him. But this certainly does not mean that he must be a formal party to a suit between the person discriminated against and the parties who are perpetrating the discrimination. As the Supreme Court of Alabama said in its opinion of May 10, 1962, Respondent did not name his fellow employees as parties defendant "because of a charge of personal misconduct." The four men indirectly affected are clearly not necessary parties. They were named as formal parties and could be eliminated tomorrow without injuring Respondent's cause of action.

CONCLUSION.

Respondent respectfully submits that Title 28, § 1257, U. S. C. A., does not clothe this Court with jurisdiction to grant the writ of certiorari requested, for the reason that the decision of the Supreme Court of Alabama is not a final judgment. Therefore, Respondent respectfully submits that the petitions should be denied. If, for any reason, Respondent is incorrect in his conclusion, and the Court should find that the judgment of the Alabama court will support an appeal, then Respondent respectfully submits that the opinion of the Supreme Court of Alabama, on a fair reading, without more, is so palpably correct as to require no correction or elaboration by this Court. If, however, a writ should be granted, Respondent respectfully

reserves and requests an opportunity to be heard on the merits.

Respectfully submitted,

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Certificate of Service.

I hereby certify that copies of the foregoing Reply Brief of Respondent in Opposition to Petitions for a Writ of Certiorari to the Supreme Court of Alabama, have been served upon Peyton D. Bibb, Esq., Attorney of Record for Petitioner, Atlantic Coast Line Railroad Company; upon E. T. Brown, Jr., Esq., Attorney of Record for Petitioners, the Grand International Brotherhood of Locomotive Engineers and C. C. Griggers; and upon Erle Pettus, Jr., Esq., Attorney of Record for Petitioner, the Brotherhood of Locomotive Firemen & Enginemen, by depositing the same in a United States mail box, first-class, postage prepaid, and properly addressed to them at their respective post office street addresses in the City of Birmingham, Alabama.

This the 6th day of October, 1962.

William M. Acker, Jr.

William M. Acker, Jr.,
As Attorney for Respondent, E. H. Milstead.